UNITED STATES OF AMERICA	)	
	)	**Prosecution Motion in Limine**
v.	)	
	)	**to Exclude Overclassification**
Manning, Bradley E.	)	
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**14 December 2012**
Fort Myer, Virginia 22211	)	

RELIEF SOUGHT

The United States in the above case respectfully requests that this Court preclude the defense from raising general overclassification in both the merits and presentencing phases of the trial. The United States seeks said exclusion to increase the efficiency of the proceedings and to ensure only admissible evidence is presented during the trial because the general overclassification evidence is irrelevant. See MRE 402.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The burden of proof on any factual issue, the resolution of which is necessary to decide a motion, shall be by preponderance of the evidence. RCM 905(c)(1). The burden of persuasion on any factual issue, the resolution of which is necessary to decide a motion, shall be on the moving party. RCM 905(c)(2). The prosecution has the burden of persuasion as the moving party. However, the burden is on the proponent of evidence to establish its relevancy. United States v. Simmons, 48 M.J. 193, 196 (CAAF 1998) (citing MRE 103).

FACTS

The Accused is charged with one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of violations of 18 U.S.C. § 793(e), five specifications of violations of 18 U.S.C. § 641, two specifications of violations of 18 U.S.C. § 1030(a)(1), and five specifications of violating a lawful general regulation, in violation of Articles 104, 134, and 92, Uniform Code of Military Justice (UCMJ). See Charge Sheet. The misconduct is alleged to have occurred between 1 November 2009 and 27 May 2010. Id.

Throughout the Article 32 and pre-trial motions, the defense has repeatedly referenced overclassification.

On 16 November 2012, the defense submitted a request for judicial notice of H.R. 553, the "Reducing Over-Classification Act," as well as transcripts of House Committee meetings on the Espionage Act (16 December 2010) and Over-Classification (22 March, 26 April, and 28 June 2007). See AE 390. These records and transcripts address overclassification in general. They do not specifically relate to the classification of any of the charged misconduct.

APPELLATE EXHIBIT 451
PAGE REFERENCED:
PAGE ___ OF ___ PAGES

On 23 November 2012, the defense filed a Motion to Compel Production of Witnesses for Merits and Sentencing. See AE 408. In it, the defense proffers that a witness (Ambassador Galbraith) will testify that many Department of State cables are overclassified and that a secret classification does not mean the information is genuinely secret. See id. at 8.

On 26 November 2012, the Court published Draft Instructions for all the Charged Offenses. See AE 410.

WITNESSES/EVIDENCE

The prosecution requests the Court consider the charge sheet and the referenced Appellate Exhibits (AE).

LEGAL AUTHORITY AND ARGUMENT

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The military judge has the initial responsibility to determine whether evidence is relevant under MRE 401. U.S. v. White, 69 M.J. 236, 239 (CAAF 2010). Relevant evidence is admissible, except as otherwise provided by the Constitution, the Code, the Rules, the Manual, or any Act of Congress applicable to members of the armed forces. MRE 402. Irrelevant evidence is not admissible. See id.; United States v. Greaves, 40 M.J. 432, 437 (CMA 1994).

Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of confusing the issues or by considerations of undue delay and waste of time. MRE 403.

I. OVERCLASSIFICATION EVIDENCE IS IRRELEVANT.

Overclassification evidence is irrelevant for three main reasons. First, a general statement that government documents may be classified too restrictively has no bearing on whether the documents at issue in the case at bar were correctly classified by their respective Original Classification Authorities (OCAs) and classified at the time of the accused's misconduct. Also, while his position as a 35F all-source intelligence analyst certainly positions the accused to understand the importance of safeguarding information, it does not qualify him to question the classification decisions of these OCAs. Second, overclassification evidence is irrelevant as to the nature of the information compromised. That a document is classified does tend to support the contention that it contains information that could be used to the injury of the United States or to the advantage of any foreign nation. The classification of a document, however, is not conclusive of whether or not the information could be used to the injury of the United States or to the advantage of any foreign nation. Not all documents that could cause damage are necessarily classified; therefore, information suggesting they are classified too highly and thus restricted too much, has no bearing on whether they contain information that could cause damage. Finally, overclassification information is irrelevant at this stage of these proceedings, as the defense has presented no evidence that the accused even knew about the

alleged "overclassification problem" the defense asserts is relevant, such that it actually affected his intent. Moreover, most of the evidence of overclassification they seek the Court to consider came into existence after the accused's misconduct occurred. Not only has the defense offered no evidence the accused actually knew about overclassification, the defense has not shown that evidence of overclassification even existed at the time of the misconduct and thus could even possibly affect his intent at the time of the offense.

A. Overclassification Evidence Is Irrelevant because it does not Pertain to the Charged Misconduct and the Accused is Not an OCA.

Any overclassification evidence offered by the defense to attempt to show the accused did not know that documents were classified is irrelevant. The accused was a 35F and, thus, was trained to understand the importance of safeguarding information and the significance of the classification markings but was neither trained nor empowered to assess circumstances and make original classification decisions. OCAs make classification determinations, and the accused was not nor had he ever been an OCA. See Exec. Order No. 13,526 § 1.1(a), 75 Fed. Reg. 707 (Dec. 29, 2009). Therefore, the accused has never been poised to question the classification of marked documents.

Information may be originally classified only by an OCA. Exec. Order No. 13,526 § 1.1(a), 75 Fed. Reg. 707 (Dec. 29, 2009). Additionally, the information must be owned by, produced by or for, or under the control of the United States Government and must fall within one or more of the categories of following categories: military plans, weapons systems, or operations; foreign government information; intelligence activities (including covert action), intelligence sources or methods, or cryptology; foreign relations or foreign activities of the United States, including confidential sources; scientific, technological, or economic matters relating to the national security; United States Government programs for safeguarding nuclear materials or facilities; vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or the development, production, or use of weapons of mass destruction. Exec. Order No. 13,526 §§ 1.1(a), 1.4(a)-(h). Finally, the OCA must determine that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security and be able to identify or describe the expected damage. Exec. Order No. 13,526 § 1.1(a).

OCAs make their classification designations based on their authority under Executive Order 13,526, Classified National Security Information (signed by President Barack Obama on 29 December 2009) or for materials classified prior to 27 June 2010 on Executive Order 12,958 (signed by President Clinton on 17 April 1995 and amended by Executive Order 13,292 signed by President Bush on 25 March 2003), as well as relevant classification guides.

The authority to classify information is limited to (1) the President and the Vice President; (2) agency heads and officials designated by the President; and (3) United States Government officials delegated this authority pursuant to paragraph (c) of this section. Exec. Order 13,526 § 1.3(a).

The President delegated the authority to make classification determinations to heads of select agencies and it remains an Executive function. Department of Navy v. Egan, 484 U.S. 518, 527 (1988) ("The authority to protect [classified] information falls on the President as head of the Executive Branch and as Commander in Chief."). The authority has been held in the relevant agencies because they have the expertise to review the information and determine the potential impact the release of that information would have on the United States as well as who can have access to that information. Id.; see, e.g., CIA v. Sims, 471 U.S. 159, 176 (1985) ("[A] court's decision whether an intelligence source will be harmed if his identity is revealed will often require complex political, historical, and psychological judgments. . . . There is no reason for a potential intelligence source, whose welfare and safety may be at stake, to have great confidence in the ability of the judges to make those judgments correctly.") .

Once an OCA has made a classification determination, it is presumed proper and it is not the province of the court to question these determinations. See United States v. Smith, 750 F.2d 1215, 1217 (4th Cir. 1984) ("[T]he government . . . may determine what information is classified. A defendant cannot challenge this classification. A court cannot question it."), vacated and remanded on other grounds, 780 F.2d 1102 (4th Cir. 1985); see also United States v. Rosen, 487 F. Supp. 2d 703, 717 (E.D. Va. 2007) ("Of course, classification decisions are for the Executive Branch . . . ."). The decision of the owner of the information must be given great deference. Sims, 471 U.S. at 176 ("The decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake.").

The accused cannot make the determination whether compromise of the information could injure the United States with respect to classification. Cf. United States v. Zettl, 889 F.2d 51, 53 (4th Cir. 1989) ("Even those with authority to see and handle the documents have no right without authority to convey the documents to others, whether or not the other party may have a need to know the information therein. Any other holding would make the possessor of any classified document the ultimate authority in deciding whether or not the document should be transferred to someone else. This, however, is a function of the government and its system of accountability for classified documents, not of someone who just happens to be in possession thereof, whether or not he rightfully possesses the document."). Classification authority, including the authority to declassify information, belongs to an OCA and his successors. See Exec. Order No. 13526 § 3.1(b). Thus, the accused lacked the authority to make classification and declassification decisions because he never occupied a position as an OCA. See id.

The defense will have the opportunity to question the OCAs regarding the procedures they followed and why they made their respective classification determinations on the charged information. Allowing the accused, who was not an OCA at the time of the charged acts, to attack a classification decision with his personal opinion based on after-the-fact evidence undermines the entire classification system and should not be permitted. See Scarbeck v. United States, 317 F.2d 546, 559-60 (D.C. Cir. 1962) (noting the absurdity of hypothetically allowing a government employee to challenge the classification decision of a superior in court), cert. denied, 374 U.S. 856 (1963). Furthermore, classification of documents outside those charged and known to the witnesses in this case are clearly irrelevant.

Evidence that a charged document is not properly classified or evidence that the Accused did not have a reason to believe that a particular charged document could be used to the injury of the United States could be relevant. Evidence in general that documents are overclassified, however, is not relevant and necessary.

B. A General Claim of Overclassification of Government Information Is Irrelevant to whether the Charged Information Could Be Used to the Injury of the United States or to the Advantage of a Foreign Nation.

Factors, including classification of the documents and expert testimony of the potential damage from disclosure of the documents to unauthorized persons, determine whether the information could be used to the injury of the United States. See Gorin v. United States, 312 U.S. 19, 29 (1941); United States v. Diaz, 69 M.J. 127, 133 (CAAF 2010). Proof of classification constitutes evidence that the compromised information could be used to the injury of the United States.[1] See Diaz, 69 M.J. at 133 ("Surely classification may demonstrate that an accused has reason to believe that the information relates to national defense and could cause harm to the United States."). Documents are classified if their unauthorized disclosure reasonably could be expected to result in damage to the national security. See Exec. Order No. 13526 § 1.1(4); Gorin, 312 U.S. at 28 (determining that the term "national defense" as used in a predecessor to § 793 is a broad concept); United States v. Morison, 844 F.2d 1057, 1071, 1074 (4th Cir. 1988) (noting that national defense information is information that is potentially damaging to the United States). Additionally, § 1030(a)(1) protects information that has been explicitly determined by the United States to be information that could used to the injury of the United States. § 18 U.S.C. § 1030(a)(1) (2012).

Determinations as to whether the document could be expected to cause damage to the national security are based on the information and circumstances known at the time of the classification decision. See United States v. Abu-Jihaad, 630 F.3d 102, 112 (2d Cir. 2010) (citing United States v. Abu-Jihaad, 600 F. Supp. 2d 362, 377 (D. Conn. 2009)) (noting that Navy operational instructions should be classified until after deployment or a visit had been approved by the host government). However, a document need not be classified to be protected under espionage laws; national defense information also receives protection under the Espionage Act. See United States v. Squillacote, 221 F.3d 542, 575-76 (4th Cir. 2000). National defense information (NDI) is a term of "broad connotations, referring to the military and naval establishments and the related activities of national preparedness." See Gorin, 312 U.S. at 28. Under the Espionage Act, unclassified NDI is protected from disclosure if it is closely held by the Government. See Squillacote, 221 F.3d at 575-76, 578 (noting that a document containing NDI "will not be considered available to the public (and therefore no longer [NDI]) until the *official* information in that document is lawfully available.") (emphasis in original). Accordingly, information that could be used to the injury of the United States includes unclassified NDI. See Gorin, 312 U.S. at 28; Squillacote, 221 F.3d at 575-76, 578. Thus, while evidence that a document is classified tends to show that it contained information that could be expected to cause damage, an allegation that documents generally may be overclassified has no

[1] Classification is not sufficient by itself nor is it the only means by which information can be shown to be the kind that could be used to the injury of the United States. Diaz, 69 M.J. at 133.

bearing on whether the documents at issue in this case included information that could be expected to cause injury to the United States or be used to the advantage of a foreign nation.

C. Evidence of Overclassification Dated After the Accused's Misconduct Is Irrelevant to His Intent at the Time of the Offense, and the Defense has Offered No Evidence that the Accused Actually Knew about any Alleged "Overclassification Problem."

After-the-fact evidence is irrelevant to a person's intent and state of mind at an earlier time. See., e.g., Gulbranson v. Duluth, Missabe & Iron Range Ry. Co., 921 F.2d 139, 142 (9th Cir. 1990) (citing Tallarico v. Trans World Airlines, Inc., 881 F.2d 566, 572 (8th Cir. 1989) (deciding that railroad's awareness of problem in 1985 not relevant to its knowledge of the problem in 1984); Whitley v. Albers, 475 U.S. 312, 323 ("An expert's after-the-fact opinion that danger was not 'imminent' in no way establishes that there was no danger, or that a conclusion by the officers that it *was* imminent would have been wholly unreasonable.") Id. The only relevant state of mind evidence is that which shows the accused's intent and state of mind at the time he committed the charged acts. See Holloway v. United States, 526 U.S. 1, 8 (1999). An after-the-fact assessment is irrelevant because the facts are examined as they appeared to the accused at the time of the charged criminal act.

In this case, there is no evidence that the accused was aware of any of the information regarding overclassification when he committed the alleged misconduct. In addition, the vast majority of the information cited by the defense to support its argument for the relevance of overclassification occurred after the accused completed his alleged misconduct. Because the facts alleged by the defense were unknown and/or unavailable to the accused at the moment he formed his intent, they could not have affected his intent or state of mind.

If the evidence raises an issue of ignorance or mistake of fact on the part of the accused in relation to the charged offenses where knowledge of a particular fact is necessary to establish an offense, a mistake of fact defense will be available; however, the mistake must be considered as it existed at the time of the offense and not with respect to after-the-fact evidence. See Benchbook (5-11-1).

D. Overclassification Evidence is Irrelevant to Pre-Sentencing Proceedings if it does not Pertain to the Charged Information and/or the Accused had no Knowledge of the Information at the Time of his Alleged Misconduct.

General over-classification information presents matters in neither extenuation nor mitigation and, thus, would not assist in determining a sentence. If the information was not in existence or unknown to the Accused at the time of the misconduct it would not assist in explaining the circumstances surrounding the commission of the offenses or assist in lessening punishment adjudged. See RCM 1001(c)(1).

II. EVEN IF DETERMINED RELEVANT, OVERCLASSIFICATION INFORMATION SHOULD BE EXCLUDED AS ITS PROBATIVE VALUE IS OUTWEIGHED BY ITS PREJUDICE.

If the Court determines that overclassification information could be tangentially relevant to the charged offenses, it should be excluded both because its probative value is substantially outweighed by the danger of issue confusion as detailed above, and also to avoid undue waste of time. See MRE 403; see also United States v. Berry, 61 M.J. 91, 95 (CAAF 2005) ("In conducting the M.R.E. 403 balancing test a military judge should consider the following factors: the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the fact-finder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties").

The defense can appropriately question the OCAs about the procedural basis for their classifications of the charged information, and the subject-matter experts about the harm its release could cause, as these issues are relevant to the matters at issue in the case at bar. The discussion of the classification of other documents would unnecessarily decrease the efficiency of an already time-consuming and confusing process. All of the factors discussed in Berry dictate that the information should not be admissible. The general overclassification information offered by the defense points to no specific evidence nor has any relationship to the case at bar. The general overclassification information, therefore, only serves as a distraction for the fact-finder.

III. THE COURT SHOULD MAKE THE DETERMINATION ON WHETHER OR NOT TO PRECLUDE OVERCLASSIFICATION EVIDENCE IN ADVANCE OF TRIAL

The Court gains considerable advantages by determining in advance whether or not general overclassification evidence is irrelevant and inadmissible during the trial. The possibility of irrelevant information being discussed is much more likely without a predetermination of relevancy on this controversial issue. See, e.g., United States v. Huet-Vaughn, 43 M.J. 105 (CAAF 1996) (containing numerous examples of the Accused testifying to irrelevant matters, Trial Counsel objecting, and the Judge sustaining the objections). Defining these issues before trial would certainly be more efficient not only by precluding discussion of irrelevant evidence, which will distract from the facts at issue, but also by preventing the litigation of extraneous issues during an already presumably lengthy trial. In addition, a predetermination of relevancy is more efficient in that it avoids producing and calling irrelevant witnesses.

CONCLUSION

A general claim of overclassification is irrelevant to all charged offenses and all cognizable defenses. None of the evidence the defense has produced has related to overclassification of the charged documents or databases, and the defense has not produced any evidence that the accused was aware of any overclassification involving the charged documents or databases. The prosecution, therefore, respectfully requests the Court grant the prosecution's motion in limine and preclude the defense from raising evidence of overclassification in the

merits and presentencing portions of the trial as the evidence is irrelevant. The Government seeks said exclusion to increase the efficiency of the proceedings and to ensure only admissible evidence is presented during trial.

ANGEL M. OVERGAARD
CPT, JA
Assistant Trial Counsel

I certify that I served or caused to be served a true copy of the above on Defense Counsel via electronic mail, on 14 December 2012.

ANGEL M. OVERGAARD
CPT, JA
Assistant Trial Counsel